

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**NILA D. RIDINGS**

Claimant

VS.

**NEW THEATRE RESTAURANT**

Respondent

AND

**NATIONAL SURETY CORP.**

Insurance Carrier

Docket No. 1,049,460

**ORDER**

**STATEMENT OF THE CASE**

Claimant requested review of the July 21, 2011, Award entered by Administrative Law Judge Steven J. Howard. The Board heard oral argument on October 21, 2011. The Director appointed E. L. Lee Kinch to serve as Appeals Board Member Pro Tem in place of former Board Member Julie A.N. Sample. James E. Martin, of Overland Park, Kansas, appeared for claimant. David J. Roberts, of Kansas City, Missouri, appeared for respondent and its insurance carrier (respondent).

The Administrative Law Judge (ALJ) denied claimant's request for benefits. He found that the risks claimant undertook at work were personal in that sitting is an activity of daily life. The ALJ further found the severity of claimant's preexisting degenerative disc disease was such that there was no causal connection between the work she performed and her current condition. In so finding, the ALJ stated the remaining issues regarding nature and extent of disability, notice, temporary total disability, and past, future and unauthorized medical were moot.

The Board has considered the record and adopted the stipulations listed in the Award. The ALJ, in the Award, listed a stipulation to timely written claim and held that respondent was estopped from denying timely written claim for purposes of the Award. Respondent disputes having made such stipulation as to any series of accidents but admits timely written claim as to the single date of accident alleged in November 2009.

### ISSUES

Claimant requests review of the ALJ's findings that her injuries were the result of activities of daily living and that there was no causal connection between her work tasks and her current condition.

Respondent contends that claimant's alleged injury or injuries did not arise out of and in the course of her employment but, instead, were caused by her preexisting degenerative disc disease. Respondent further argues that claimant's disability is the result of the natural aging process, which was exacerbated by activities of daily living.

The issues for the Board's review are whether the ALJ erred in finding claimant's injuries were the result of events of daily living and/or were a result of the natural aging process? Stated another way, did claimant prove she suffered personal injuries by a series of accidents or repetitive traumas that arose out of and in the course of her employment with respondent? The remaining issues were not reached by the ALJ and, therefore, will not be addressed by the Board.

### FINDINGS OF FACT

Claimant filed an Application for Hearing on February 12, 2010, claiming a series of injuries from on or about January 1, 2009, and every day worked thereafter to December 30, 2009. She claimed spinal injuries caused by performing her regular duties in unusual or awkward positions utilizing unsafe ergonomics.

Claimant has had two previous workers compensation claims that resulted in awards for permanent partial disability compensation. On January 21, 1991, she was involved in an automobile accident while working and suffered injuries to her lumbar spine that included pain radiating into her right leg. Claimant underwent a discectomy on her lumbar spine at the L4-5 level performed by Dr. Steven Reintjes. Claimant testified she had a good result from the surgery in 1991. She was able to return to work, and she worked several jobs, including a job with Midwest Airlines where she loaded and unloaded baggage and mail. Her claim was settled based on a 17 percent impairment to her whole body.

On May 12, 1996, claimant suffered another workers compensation injury to her low back when she pulled some muscles in her back. She settled her workers compensation claim based on a 5 percent permanent partial impairment to the whole body. Claimant also was injured in a fall in June 2001, which she said injured only her shoulder. She fell again in December 2002, but again she did not injure her back or leg. She was involved in an automobile accident on May 28, 2003, suffering injuries to her neck only.

Claimant testified concerning an incident in Wyoming while she worked at a resort near Yellowstone National Park when her back became sore after she made up

approximately 75 beds one day, which was not part of her normal duties. After making the beds, she went to the nurse for some aspirin. She was then not allowed to return to work until she had a release from a doctor. Claimant went to a clinic for the release and told them she had suffered back pain and a burning sensation down her right leg that resulted in permanent nerve damage to her right leg below the knee. Claimant was given a release to return to work and did so. However, in order to be reimbursed for the cost of the clinic visit, she had to make a workers compensation claim. She believes that the bill was not paid by workers compensation and finally the clinic just wrote it off. She denied receiving any settlement in that incident.

Claimant became employed at respondent in October 2008 as a sales representative. Her job entailed selling tickets to theater performances, exchanging tickets for season ticket holders, and selling gift certificates. When she first started, she worked at a kiosk at Oak Park Mall. She had no physical problems while working at the kiosk. After the Christmas season, she changed locations and started working at the box office window at the theater.

Claimant testified that when working at the box office window, she sat on a barstool that had no arms. She said her feet would not touch the floor, so she had to put her feet up on a shelf to stay balanced. She said the telephone was to the right of her computer, and she would answer it with her left hand and then hold the phone between her ear and shoulder on the left side. She had no headset. She testified that she would be twisted as she tried to balance herself and enter information into the computer. Claimant testified she developed back pain her first day working the box office window and later developed pain down her right leg. She told her supervisor, Mendy Rose, about the problem with the work area and about her back problem her first day at the box office, but nothing was done to correct the problem.

Claimant said that at the end of a two to three week period, she was moved into the sales office, which was adjacent to the box office. However, the move gave her no relief. There, she answered telephone calls, and she had a headset for the phone. Claimant did not have a desk. Instead, there was a board that went the length of the room with partitions for each work station. The floor was slanted downward, so she kept a box under her work station on which she kept her feet to prevent her chair from sliding forward. Her feet would not touch the floor and her thighs were not parallel to the floor. She said she had to lean forward to keep herself from sliding under the desk yet keep her hands on the keyboard. She said her computer screen sat too low. These conditions made her back hurt worse.

Claimant testified that although she told Ms. Rose numerous times about her work areas causing her back pain, she was not sent for medical treatment. Claimant decided to seek treatment on her own, and at first she saw a chiropractor. Around the end of March 2009, she saw a neurosurgeon, Dr. Darren Lovick. Dr. Lovick recommended surgery, but claimant wanted a second opinion and went to see Dr. Reintjes, who had previously performed surgery on her back. Dr. Reintjes also recommended surgery, which

was then scheduled for August 13, 2009. Before claimant went in for surgery, she said she spoke to Ms. Rose, telling her she would be off work for back surgery that was related to the work station problem. Claimant also spoke with Melinda Coffman before her surgery and told her she had herniated discs in her back and was going to have surgery because of the way she had to sit in her chair. Claimant said she asked Ms. Coleman if respondent would make arrangements to change her work station so she could raise the computer screen.<sup>1</sup>

Claimant's last day of work before her surgery was August 10, 2009. She returned to work after her surgery on September 30, 2009. She returned to the same work station in the sales office and continued to have back pain caused by having to lean forward. Around Thanksgiving 2009, respondent sent her to the mall to work in the kiosk. However, respondent had changed the chairs in the kiosk to the same type of barstools as were at the box office work station. She ended up with back pain that ran down her left leg.<sup>2</sup> She returned to see Dr. Reintjes.

In November 2009, claimant received a letter from ACS Recovery Services (ACS) asking about the reason for her back surgery. In speaking with a representative of ACS, claimant was told there was something in her medical records that indicated her back surgery should have been covered under workers compensation. Claimant said she filled out an Employee Incident Report Form concerning the incident at the kiosk, setting out an incident date of November 20, 2009. In the incident report, she claimed pain in her back, numbness in her right leg, and shooting pain down her left leg that stopped at the knee. She attributed her injuries to sitting on a hard surface chair for an extended period of time causing her spine to compress. Claimant testified that Ms. Katie Twenter, respondent's human resources generalist,<sup>3</sup> arranged to have her moved to a work station in an area where the floor was not slanted and the computer screen could be raised so she could sit normally with her feet flat on the floor and her eyes parallel with the computer screen. Claimant said she worked there six to eight weeks and then was terminated.

Claimant has not worked since she was terminated on December 29 or 30, 2009. Currently, her right leg swells and is numb and cold from right below the knee to the ends of her toes. She has pain and a tingling feeling down her left leg. She has back pain that comes and goes. She has a foot drop on her right, which causes her to fall. Claimant has not worked since she was terminated by respondent.

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<sup>1</sup> This was the first time she spoke with anyone from the Human Resources Department about her work area problems.

<sup>2</sup> This was the first time she had pain in her left leg.

<sup>3</sup> Ms. Coleman's employment with respondent had ended during the time claimant was off for back surgery. Ms. Twenter, who had previously worked under Ms. Coleman, was left as the only person in respondent's Human Resources Department.

Melinda Coleman testified that while she was employed by respondent as the director of human resources, she would have been aware of all reports of workers' injuries. Ms. Coleman said claimant never told her she had a job-related injury. Ms. Coleman was aware claimant took leave from work for surgery in August 2009, but claimant did not tell her the surgery was related to a work injury. She vaguely remembered that shortly before claimant's surgery, claimant asked her if it would be possible to change her workstation when she came back from surgery.

Katie Twenter is a human resources generalist at respondent. She administers the benefits, including workers compensation benefits, and performs new employee hire orientations. She did the orientation when claimant started in October 2008. Ms. Twenter testified that before claimant's surgery, she had received emails from claimant to the effect that she was having back surgery and needed a leave of absence. Claimant did not say the surgery was related to an on the job injury.

On November 23, 2009, claimant notified Ms. Twenter by letter that she had experienced a work-related injury and also indicated she needed accommodation. That same day Ms. Twenter responded to claimant, telling her to get with her manager to get paperwork completed. Claimant returned an incident report form to Ms. Twenter and Ms. Twenter processed it the same day. The incident report set out a date of accident of November 20, 2009. However, in her letter to Ms. Twenter, claimant stated her back problems started in January 2009 while sitting at the box office window. The letter also said she had another problem the week before while sitting on a chair at the kiosk in the mall.

Mendy Rose works for respondent as sales manager and was claimant's supervisor. She testified claimant would have worked at the box office one out of every six days worked. The other five days she would be in the sales office. Ms. Rose said there was not a time claimant worked at the box office every day. She said there was no rule against standing at the box office or sales office. At the kiosk, employees are encouraged to be up and out in front of the kiosk handing out brochures.

Ms. Rose said claimant first mentioned workers compensation in a conversation they had on or about October 29, 2009, at which time claimant mentioned that her back surgery could have been a workers compensation claim because of the uncomfortable seating arrangement she endured since starting to work for respondent. Ms. Rose testified she did not understand then that she was being put on notice that claimant was making a workers compensation claim but only believed claimant could have but chose not to make a claim. Before her conversation with claimant on or about October 29, 2009, claimant had not indicated her back problems were related to her work at respondent.

Tyler Lasche worked at respondent as a sales associate. As a sales associate, he took his turn working the box office. The seat was higher, but he could put his feet on a pedestal so they are not just hanging. There was no headset, but he said his head was not fully ajar to hold the phone without using his hand because there was a headrest on the

phone. He also worked at the mall kiosk and at a work station in the sales office. He said that the floor in the sales office is a little slanted. He considered the tasks he performed to be similar to the tasks he performed at home in the normal course of daily living, *i.e.*, sitting, standing and answering the phone.

Mr. Lasche said in November 2008, soon after he and claimant started working together, she told him she had been in a car accident, had suffered back injuries, and still suffered from back problems due to the car accident. He did not observe a time when claimant was not able to perform any of her duties at the kiosk. He said they lifted and sorted boxes, she got down on her knees, and did all the other tasks. He also did not observe that there was anything claimant could not do in January 2009 after they were moved to the sales office and box office. Claimant at some point asked to be moved to a different work station. Mr. Lasche thought claimant wanted more room on her desk and wanted to prop her monitor up more.

Cherylaine Sullivan is claimant's neighbor. In early 2009, at claimant's recommendation, she was hired by respondent as a sales assistant. She no longer works for respondent. She said that employees were perched up at the sales window on high barstools that had no arms. The employees had to hold the phone with their shoulder and turn around to type, and had to bend over to get the tickets that had been printed. The floor in the sales office sloped, and claimant told her there was a box underneath her station that she had to keep her foot on to prevent her from rolling under the counter. Claimant told Ms. Sullivan she spoke to Ms. Rose several times about the issue with the workstation. While Ms. Sullivan worked at respondent, claimant told her she was seeking treatment for her back pain that resulted from her employment. She had not observed claimant at any time exhibiting pain symptoms or problems with her back before January 2009.

Dr. Edward Prostic, a board certified orthopedic surgeon, evaluated claimant on March 24, 2010, at the request of claimant's attorney. He understood his evaluation was in regard to a work-related injury that occurred on or about January 1, 2009, and continued through her last date of employment at respondent. Claimant told Dr. Prostic she had pain in her right low back below the waist with numbness from her right knee to the medial right foot. She said she would at times catch her foot while walking. She had stiffness upon awakening. She had worsening with activity and had difficulty with numerous household chores.

Upon examination, claimant had significant loss of motion, significant right calf atrophy, and evidence of significant dysfunction of the right L5 nerve and mild loss of sensation in the L4 dermatome. Dr. Prostic said these findings are consistent with a new injury superimposed upon claimant's 1991 surgery. X-rays taken of claimant showed severe degenerative disc disease at L5-S1 and L4-L5 and moderate disc disease at L3-4. He said the pain claimant is reporting predominantly below the waist is most likely an aggravation of her degenerative disc disease at L5-S1. The weakness of her leg with difficulty raising her foot when she walks is from an injury to the L5 nerve root, the nerve

that was most likely addressed in 1991 but which has been aggravated by the more recent injury and surgery. Claimant also has severe deconditioning with loss of ability to squat and loss of flexibility of the low back.

Dr. Prostin diagnosed claimant with sustained herniation of disc at L3-4 with resulting injuries to the L4 and L5 nerve roots and subsequent aggravation of preexisting degenerative disc disease and severe lumbar deconditioning. He opined the immediate cause of claimant's diagnosis was her work injuries at respondent from January 1, 2009, through the remainder of her working days there.

Dr. Prostin said that claimant's surgery was necessary but did not give claimant the relief it normally would. He recommends that claimant have conservative care to her low back with intermittent heat and ice, massage, gentle but increasing exercises, and anti-inflammatory medicine. He suggested she improve her level of conditioning, lose weight, and tone up her core muscles.

Based on the AMA *Guides*, Dr. Prostin rated claimant as having a 20 percent functional impairment to the body as a whole using the range of motion model. Dr. Prostin said that all of his 20 percent impairment rating was due to her new injury. Dr. Prostin recommended that claimant be limited to light duty employment with the ability to change positions as necessary for comfort. She should have a 20-pound lifting maximum while lifting from knee to shoulder, half that much weight for frequent lifting. She should avoid frequent bending or twisting at the waist, forceful pushing or pulling, and more than minimal use of vibrating equipment.

Dr. Prostin agreed with respondent's attorney that claimant had degenerative disc disease before her employment with respondent. And he agreed that for someone with degenerative disc disease, it was possible for everyday activities to create a disc herniation. Dr. Prostin said the mechanism of claimant's injury, as she set it out, was unlikely to herniate a previously normal disc. It was more likely to aggravate a previously deranged disc. More likely than not, a cascade of degenerative changes had occurred to the disc before the twisting events at the restaurant. Dr. Prostin said that claimant's degenerative disc disease made her more vulnerable to this injury occurring. Claimant's twisting repetitiously at work worsened her condition, allowing protrusion of the disc and injuring two nerve roots.

Dr. Prostin said the AMA *Guides* was copyrighted in 1993. He said if claimant was rated before the inception of the *Guides*, he would not be able to rate the previous condition/surgery using the *Guides* without knowing the specifics of her condition and physical findings.

Dr. Jeffrey MacMillan, a board certified orthopedic surgeon, evaluated claimant on September 15, 2010, at the request of respondent. Claimant reported she had a motor vehicle accident in 1991 resulting in a L4-5 herniation, which was treated surgically.

Claimant told him about having to sit in unusual positions and twist and turn while working for respondent. She had a subsequent surgery at L3-4 in 2009. Dr. MacMillan said from the claimant's description of her activity level, she appeared to be functioning within the light physical demands category.

Dr. MacMillan testified that during his examination, claimant was a little stiff and had some difficulty with lumbar flexion. She had weakness of her right ankle dorsiflexion. She had some numbness or dullness to light touch in the anterior of her right leg and top of her right foot. Reflexes were normal. She had trouble with heel walking on the right side due to ankle weakness, and she had a mild foot drop when she walked. X-rays taken of claimant's spine in the examination revealed she had mild degenerative scoliosis in her lumbar spine. Dr. MacMillan said the x-rays show that claimant had significant degenerative disc disease throughout the entire lumbar spine.

Based upon Dr. MacMillan's review of the medical records and his interview with claimant, he found no evidence to suggest claimant's L3-4 disc herniation was related to a vocational accidental injury or condition. He related the herniation solely to claimant's degenerative disc disease. Dr. MacMillan said healthy discs do not herniate; with very rare exceptions, only degenerative discs herniate. He said the majority of disc herniations occur spontaneously, not as the result of a specific accident or injury. In those instances where a disc herniation is related to injury, the individual typically gives a very clear history of something happening resulting in the onset of symptoms, such as an individual feeling a pop with immediate pain. The history that claimant provided did not give any indication of an injury. She attributed the injury to a sitting position, but Dr. MacMillan noted there are numerous activities people engage in through the course of our daily lives that put them in a sitting position. Dr. MacMillan said there was nothing that clearly distinguishes claimant's work-related activities as having caused, provoked or contributed to the onset of her symptoms.

Claimant complained to Dr. MacMillan of right foot drop. He stated that claimant's foot drop is absolutely not related to her L3-4 disc herniation. The L-5 nerve root gives sensation to the anterior leg, the dorsi with the foot and provides motor function to the ankle and toes for extension. The L-5 nerve root would typically be affected by an L4-5 disc herniation, and that was the one claimant had back in 1991. He said that claimant's medical records through the 1990s all reference the foot drop and the numbness.

Based on the *AMA Guides*, Dr. MacMillan rated claimant as having a 27 percent whole person impairment. He opined further that claimant had a 22 percent whole person impairment as a result of her prior injuries, which, when subtracted from her impairment as of September 15, 2010, would leave a 5 percent whole person impairment apportionable to her current injuries. Dr. MacMillan based the preexisting 22 percent disability on the medical records available to him. Also, the records available to him from the Kansas Workers Compensation Division showed that claimant had been compensated for a 17 percent impairment due to a 1991 accident and a 5 percent impairment due to a 1995 injury.

Dr. MacMillan stated that the intention of the *AMA Guides* is that someone can never have a series of disabilities or impairments that exceed 100 percent. He said it did not matter what the standard was that the previous settlements came under. He said the physician would take whatever the employee's current impairment is and subtract the percentages they received in the past and the difference becomes apportionable to whatever is current. Dr. MacMillan stated that, in reviewing the records available to him, he would have given claimant a 20 percent impairment following her 1991 accident and surgery based on DRE IV, because she had some radiculopathy. Claimant had another injury to her back in 1995, for which he believes she had a 5 percent impairment. The 5 percent impairment in 1995 did not include the permanent partial disability she had as a result of her 1992 disc herniation.

Dr. MacMillan said there was nothing in the records he saw which indicated there was a work related incident that would have caused this condition. Dr. MacMillan testified he considered sitting on a hard chair to be an activity of daily living. It was Dr. MacMillan's understanding that claimant was not symptom-free following her 1991 back surgery. But it was not until 2009 that she required another surgery. Dr. MacMillan did not ask claimant what symptoms, if any, she was having in her back before January 2009.

Claimant was evaluated by Dr. Terrence Pratt on December 7, 2010, by order of the ALJ. Claimant gave him a history of her automobile accident, the incident concerning the drawer, and the incident in Wyoming. She gave him information concerning her work stations in her work for respondent and her medical treatment, including the 2009 surgery performed by Dr. Reintjes. At the time of the evaluation, claimant was not suffering any low back pain or lower extremity discomfort. She said she occasionally has pins and needles involving the distal two thirds of the lateral thigh on the left. She complained of weakness of the right lower extremity.

After taking claimant's history, reviewing her past medical records, and performing a physical examination, Dr. Pratt diagnosed her with low back pain with history of herniated discs L4-5 and L3-4, both status postoperative intervention, and multilevel degenerative disc disease, lumbosacral region. Based on the *AMA Guides*, he concluded her involvement was more appropriately in DRE V for a 25 percent impairment to the whole person. The ALJ instructed Dr. Pratt not to express an opinion on causation but he did state that 17 percent of the 25 percent impairment rating would be considered preexisting.

#### **PRINCIPLES OF LAW**

K.S.A. 2010 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a

preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.<sup>4</sup> Whether an accident arises out of and in the course of the worker's employment depends upon the facts peculiar to the particular case.<sup>5</sup>

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

The phrase "out of" employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises "out of" employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer's service.<sup>6</sup>

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.<sup>7</sup> The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.<sup>8</sup> An injury is not compensable, however, where the worsening or new injury would have occurred even absent the accidental injury or where the injury is shown to have been produced by an independent intervening cause.<sup>9</sup>

K.S.A. 2010 Supp. 44-501(c) states:

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<sup>4</sup> K.S.A. 2010 Supp. 44-501(a).

<sup>5</sup> *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

<sup>6</sup> *Id.* at 278.

<sup>7</sup> *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

<sup>8</sup> *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

<sup>9</sup> *Nance v. Harvey County*, 263 Kan. 542, 547-50, 952 P.2d 411 (1997).

The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.

In *Hensley*<sup>10</sup>, the Kansas Supreme Court adopted a risk analysis. It categorized risks into three categories: (1) those distinctly associated with the job; (2) risks which are personal to the workman; and (3) neutral risks which have no particular employment or personal character. According to Larson's *The Law of Workmen's Compensation*, Sec. 7.04, the majority of jurisdictions compensate workers who are injured in unexplained falls upon the basis that an unexplained fall is a neutral risk and would not have otherwise occurred at work if claimant had not been working. Although in this case claimant did not have an unexplained fall, his accident could be described as falling into the same category of a neutral risk.

K.S.A. 2010 Supp. 44-508(d) states:

"Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment. In cases where the accident occurs as a result of a series of events, repetitive use, cumulative traumas or microtraumas, the date of accident shall be the date the authorized physician takes the employee off work due to the condition or restricts the employee from performing the work which is the cause of the condition. In the event the worker is not taken off work or restricted as above described, then the date of injury shall be the earliest of the following dates: (1) The date upon which the employee gives written notice to the employer of the injury; or (2) the date the condition is diagnosed as work related, provided such fact is communicated in writing to the injured worker. In cases where none of the above criteria are met, then the date of accident shall be determined by the administrative law judge based on all the evidence and circumstances; and in no event shall the date of accident be the date of, or the day before the regular hearing. Nothing in this subsection shall be construed to preclude a worker's right to make a claim for aggravation of injuries under the workers compensation act.

K.S.A. 2010 Supp. 44-508(e) states:

(e) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. An injury shall not be deemed to have been directly caused by the employment where it is

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<sup>10</sup> *Hensley v. Carl Graham Glass*, 226 Kan. 256, 258, 597 P.2d 641 (1979).

shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.<sup>11</sup>

In *Bryant*,<sup>12</sup> the Kansas Supreme Court recently stated:

Even though no bright-line test for whether an injury arises out of employment is possible, the focus of inquiry should be on the [*sic*] whether the activity that results in injury is connected to, or is inherent in, the performance of the job. The statutory scheme does not reduce the analysis to an isolated movement[–] bending, twisting, lifting, walking, or other body motions but looks to the overall context of what the worker was doing[–]welding, reaching for tools, getting in or out of a vehicle, or engaging in other work-related activities.

### ANALYSIS

The ALJ denied claimant's claim for workers compensation benefits based upon his finding that claimant's employment activities did not increase her risk of injury because her injuries were the result of an ongoing degenerative process and her work activities were the normal activities of daily life. Based upon this determination, the ALJ found that all of the other issues raised by the parties were moot. Because the Board's review is limited to the issues decided by the ALJ, the Board's reversal of the ALJ on the preceding issues means this case must be remanded to the ALJ for his determination of those remaining issues not reached by the ALJ in his original Award.

Claimant has a history of back problems, including prior accidents and a surgery in 1991. However, she had thereafter been able to continue working, including a job where she loaded and unloaded baggage. When claimant began working for respondent in October 2008, she had not had any accidents or injuries to her back for several years, she was not receiving medical treatment for her back, and her back was not symptomatic. Claimant worked for several months without incident until she changed locations and started working at the box office at the theater. This location required that she sit on a high stool that had no arms and where her legs did not touch the floor. The location of the telephone and computer, which she operated more or less constantly, required her to bend, twist and work in awkward positions. This caused her back to become symptomatic. She also developed pain down her right leg. After she was moved to the sales office, claimant continued to experience problems because the floor was slanted so she was still required to sit in an awkward position. These conditions continued to aggravate her back. Eventually she also developed symptoms in her left leg.

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<sup>11</sup> See *Johnson v. State of Kansas*, No. 1,055,487, 2011 WL 4011696 (Kan. WCAB Aug. 11, 2011); *Perry v. GEMB Servicing Co.*, No. 1,040,895, 2101 WL 4449302 (Kan. WCAB Oct. 29, 2010).

<sup>12</sup> *Bryant v. Midwest Staff Solutions, Inc.*, 292 Kan. 585, 596, 257 P.3d 255 (2011).

Dr. Prostin related these conditions under which claimant was required to work as the cause of her worsening symptoms and an aggravation of her preexisting degenerative disc disease. He diagnosed a new injury superimposed upon claimant's prior condition. He said claimant's work activities aggravated her condition beyond what would normally occur and accelerated her need for surgery. He rated claimant's permanent impairment of function and recommended restrictions which included limiting some of the activities claimant had been required to perform in her job with respondent. Dr. Pratt, the court-ordered independent medical examination physician, likewise opined that claimant's permanent impairment of function had increased. He rated claimant as having a 25 percent whole body impairment, of which only 17 percent preexisted claimant's employment with respondent.

In the recent *Bryant* decision, the Kansas Supreme Court noted that in the determination of whether an injury arises out of the employment, the focus of inquiry is whether the activity that results in injury is connected to or is inherent in the performance of the job. The analysis is not on an isolated movement such as bending, twisting, lifting, walking, sitting or other body motions or postures but, instead, focuses on the overall context of what the worker was doing in performing the work-related activities. Here, claimant identified and described how the method of performing her tasks was different from the normal activities of day-to-day living and how the job caused her worsening pain and resulted in injury. The Board finds claimant has met her burden of proving she suffered injury by a series of accidents that arose out of and occurred in the course of her employment with respondent.

#### **CONCLUSION**

Claimant suffered a permanent aggravation of her preexisting low back condition by a series of accidents and traumas that arose out of and in the course of her employment with respondent. The injury and resulting disability were work related and were not a result of the natural aging process or the normal activities of day-to-day living.

#### **AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Steven J. Howard dated July 21, 2011, is reversed and remanded to the ALJ for a determination of the remaining issues.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of November, 2011.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: James E. Martin, Attorney for Claimant  
David J. Roberts, Attorney for Respondent and its Insurance Carrier  
Steven J. Howard, Administrative Law Judge